No. 3986

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KELLY, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 3986

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Brief for Plaintiff in Error

L. V. RAY,
Attorney for Plaintiff in Error
SEWARD, ALASKA

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KELLY, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 3986

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Brief for Plaintiff in Error

L. V. RAY,
Attorney for Plaintiff in Error
SEWARD, ALASKA

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KELLY, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 3986

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Brief for Plaintiff in Error

STATEMENT OF THE CASE

Kelly, plaintiff in error, was convicted upon an indictment charging violations of the Mann Act; in the District Court for the Territory of Alaska, Third Division. The indictment contained eight counts predicated upon the furnishing of transportation for

two young women from Seattle, Washington, to Anchorage, Alaska.

Judgment was entered upon the 3rd day of March, 1922, and pending the settlement of Bill of Exceptions, Kelly became aware for the first time that a member of the jury had formerly been convicted of a felony. A motion to vacate the judgment, as void, was denied.

Kelly operated a pool, billiard hall, bowling alley and amusement place in Anchorage, and sought to secure for his patrons an attractive musical program. He cabled on August 1, 1921, from Anchorage, Alaska, to Seattle, Washington, to two young women, recommended to him as cabaret performers, making inquiries as to the availability of such young women, one to sing, the other to play the piano.

Telegraphic correspondence resulted in the young women agreeing to come to Alaska to render the service indicated, upon a stipulated salary, with the condition that Kelly advance and pay all transportation expenses; such sums so paid were to be refunded by the deduction of a stated amount from the weekly salaries of the artists until Kelly was fully reimbursed for such expenditures.

The contract being accepted, Kelly, on August 3, 1921, wired transportation to the young women, they accepted such transportation and came from Seattle, Washington, to Anchorage, Alaska, arriving August 20th, 1921.

On September 5th, 1921, the two young women quit their employ as entertainers, owing Kelly $227.51 Record, p. 111), as evidenced by written memoranda therefor signed by the young women, which amount covered transportation costs and expenditures for wearing apparel, the latter made necessary by the fact the young women lacked adequate clothing.

The Government was permitted to detail conversations and acts of the defendant in his conduct toward the young women subsequent to the date of transportation upon the theory that testimony, as to the general atmosphere of the place, and conditions surrounding the employment was admissible to prove the intent existing at the time transportation was furnished.

ASSIGNMENT OF ERRORS

First. The Court erred in permitting the witness, Mildred Bowles, to testify to matters foreign to the issues raised by the indictment, over and

against the objection of the defendant and excepted as follows:

Q. Who invited you to go out there to the Lake?

MR. RAY. We object to that."

Objection overruled, defendants allowed an exception.

A. "It was Mr. Anderson suggested it to those in the box at the Frisco, where Mr. and Mrs Kelly, myself, Mr. Anderson, Mr. Evans and Margaret were having supper, after two o'clock,—after the pool-hall was closed, and it was very agreeable to everybody.

Q. Who had the liquor?

A. That I don't know for a positive fact, whether Mr. Anderson or Mr. Evans had it, but it was brought in. They made arrangements and it was brought there to the box.

MR. RAY. We move that to be stricken as not responsive to the question."

Motion denied; defendants allowed an exception.

Second. The Court erred in permitting the witness, Mildred Hilkert, to testify to matters foreign to the issues raised by the indictment, over and against the objection of the defendant, and excepted as follows:

Q. "What, if anything, further was said by Mrs. Kelly at this time?

MR. RAY. We object to the question propounded by the District Attorney to the witness on the ground that it seeks to perjudice the jury and inflame their minds against the defendants and can in no manner tend to prove whether or not on the third day of August, 1921, the defendant Kelly wired to the witness on the stand with the intent and purpose to induce her to live the life of a prostitute or to live a life of debauchery or to indulge in other criminal practices, as charged in the indictment."

Objection overruled; defendants allowed an exception.

Q. "At this time did she say anything further to these girls or say anything further than you have already stated when she called you over across the hall?

A. Not just at that moment.

Q. What, if anything, did she say?

THE COURT. About the same subject.

A. I walked across the pool-hall to the side room; three girls were in the back room, and Mrs. Kelly was standing at the door and I asked her what was the idea, that I wasn't accustomed to associating with these people, and she said, 'These girls are all right; they are good fellows, good spenders, come in and meet them,' and me and my sister walked in and were introduced to the girls, and they bought several drinks and there were two or three men with them.

MR. RAY. We move to strike the answer."

Motion denied; defendants except.

Third. The Court erred in permitting the wit-

ness, Margaret Johnson, to testify to matters foreign to the issues raised by the indictment over and against the objection of the defendant, relative to a trip to Lake Spenard, and excepted to as follows:

> MR. RAY. "It is understood that there is an objection on the part of each defendant to this line of testimony now sought to be elicited.
>
> The COURT. Yes, I understand that all objections are made in behalf of both defendants, and it is understood that all the testimony in regard to this particular occurrence, this trip to Lake Spenard, goes in under the objection of both defendants.

Fourth. The Court erred in permitting the witness, Margaret Johnson, to testify to matters foreign to the issues raised by the indictment, over and against the objection of the defendant and excepted to, as follows:

> "Q. Did Mr. Kelly ever speak to you about a hunting party?
>
> A. Yes, he spoke to me.
>
> Q. Can you fix the time?
>
> A. It was the Thursday or Friday before Labor Day. There were three big days coming up —it was Thursday, Friday before that, before Saturday, Sunday and Monday.
>
> Q. What did he say?
>
> MR. RAY. We object to that as incompetent, irrelevant and immaterial and not tending to

prove any of the issues in the case, and has been ruled out by the Court with reference to the witness, Mrs. Bowles.

The COURT. It was admitted to allow the jury to consider it with the intent. The objection will be over-ruled and exception allowed.

A. He said, "Well, it will soon be over, girls; we have three hard days ahead of us." He said, "The old lady is going on a hunting trip and when she is gone Mildred and Sid and I and you will have a regular party," and I said, "What do you mean by a regular party?" and he said, "We will have two or three quarts of good stuff to drink; we will have bonded stuff. We will sell the mule here, but we will drink good stuff," and Mildred said, "Do you mean a bedroom party, Kelly?" and he said, "Sure; you are only human and it wont hurt you once."

Fifth. The Court erred in refusing to permit the witness Pierce to testify as to the character of the place conducted by the defendant, Kelly, to which exception was taken as follows:

"Q. Did you ever at any time that you were employed there see anything that would indicate the fact that the practice of prostitution was being indulged?

A. Nothing at all.

Mr. DUGGAN. We object to that and move to strike the answer."

Objection sustained and motion granted.

Defendants excepted.

Sixth. The Court erred in refusing and denying the motion of the defendant for a directed verdict and made at the close of all the testimony as follows:

> By Mr. RAY. "My second motion is as follows: Comes now the defendants, Mrs. Grace Kelly and Frank Kelly, and move the Court to instruct the jury to return a verdict of not guilty as to both defendants upon all the counts in the indictment in this case on the ground that the uncontradicted evidence submitted in this case shows that the witnesses, Misses Hilkert, came to Alaska under a contract of employment with the defendant, Frank Kelly, entered into by means of telegraphic and cable communication, and that as a consideration of the contract and one element thereof, the witnesses, the Misses Hilkert, were to repay Frank Kelly, the defendant, the cost of transportation advanced by the said Kelly to the Misses Hilkert, upon the basis of a deduction of $5.00 per week from the contracted salary as set forth in such telegraphic communication, and that the advance of such transportation with the contract to repay, as shown by the uncontradicted evidence in this case, does not come under the Interstate Commerce Regulations and is not a violation of the so-called White Slave Act."

After argument both motions were by the Court denied and defendants allowed an exception to the rulings (Jury returns).

Seventh. The Court erred in permitting the introduction over and against the objection and duly allowed exceptions of the defendant of testimony of various witnesses relative to events and occurrences

transpiring after the 4th day of August, 1921, the date of furnishing of the transportation plead in the indictment, as exemplified in the excerpts of testimony already herein assigned as error; this general assignment necessary, otherwise a major portion of the testimony given at the trial would have to be repeated verbatim herein.

Eighth. The Court erred in denying the motion of defendant for a new trial as based upon the misconduct of a juror, and for the other reasons urged in said motion.

Ninth. The Court erred in denying the motion of defendant in arrest of judgment.

Tenth. The Court erred in entering judgment in said cause against the defendant.

Eleventh. The Court erred in refusing to grant the motion of the defendant, Frank Kelly, for a directed verdict of "Not Guilty" at the close of all the testimony, upon the ground urged as to insufficiency of the proof offered and given to warrant submission of the cause to the jury.

Twelfth. The Court erred in denying the motion of defendant to vacate the judgment and sentence as void upon a verdict of an illegally constituted jury.

Thirteenth. The Court erred in giving the following instructions to the jury, the same being that portion of instruction Number 5 on the question of reasonable doubt, reading as follows:

> "A reasonable doubt is such a doubt as may fairly and naturally arise in your minds after fully and fairly considering all the evidence in the case. It is that state of the case which leaves the minds of the jurors, after comparison and consideration of all the evidence, in such condition that they cannot say they feel an abiding conviction to a moral certainty of the guilt of the defendant. A moral certainty is not an absolute certainty, but such a certainty as excludes every reasonable hypothesis creating a doubt."

To the giving of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Fourteenth. The Court erred in giving that portion of the instruction of the Court numbered eight, said portion reading as follows:

> "You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time of securing the tickets, if you find it has any such bearing."

The whole instruction reads as follows:

> "If you find from the evidence that the defendants, or either of them, furnished or aided in

furnishing the transportation that brought the girls from Seattle to Anchorage, and caused it to be delivered to the girls for that purpose, the only remaining question for you to determine is the purpose or intent either defendant had in mind at the time of securing or aiding to secure said transportation; that is, did either defendant in so securing or aiding to secure said transportation, if you find that either defendant, or both, did secure or help to secure the same, have in mind the intent to bring said girls or either of them to Alaska with the purpose to induce, entice or persuade said girls, or either of them, to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice. If you find beyond all reasonable doubt that said defendants, or either of them, did bring or aid in bringing said girls to Alaska from Seattle for any of the unlawful purposes named, then you will find such defendants guilty upon the count or counts which you so find to be proved beyond all reasonable doubt.

"But unless you do so find beyond all reasonable doubt that the defendants, or either of them, had such intent at the time said transportation was furnished; you cannot return a verdict of guilty against them or against the one, if either, who lacked such intent at the time of furnishing said transportation.

"If you find from the evidence that the defendants, or either of them, formed the intent and purpose after the girls arrived in Anchorage to persuade them to enter upon any of the unlawful and immoral practices set forth in the indictment such finding will not authorize a conviction in this case, because the defendants are not charged in the indictment with any unlawful act done or purpose arising after the girls arrived in Anchorage.

"All the testimony admitted in the case other than that designed to show that defendants secured or aided in securing the steamship tickets which were the means of transporting the girls to Anchorage from Seattle was admitted for the sole purpose of showing the intent on the part of the defendant, or either of them, in furnishing said transportation, and it is not to be considered by you for any other purpose. You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time of securing the tickets, if you find it has any such bearing.

"If you find that any of the evidence admitted by the Court may tend to show that other offenses may have been committed by defendant, or either of them, in or about the Kelly pool-hall or building while the girls were there, such evidence is to be disregarded by you unless you find that it has some bearing upon the question of the intent of defendants in securing said transportation to bring the girls from Seattle to Anchorage, and then it is to be considered only so far as you may find it may affect the question of such intent."

To which portion of said instruction the defendant duly excepted in the presence of the jury, and before they retired, which exception was by the Court allowed.

Fifteenth. The Court erred in giving instruction numbered 11, reading as follows:

"You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other

side to contradict, and therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust."

To the giving of which the defendants duly excepted in the presence of the jury and before they retired, upon the ground that it is not incumbent upon the defendants, or either of them, to prove their innocence or produce any testimony, which exception was by the Court allowed.

Sixteenth. The Court erred in refusing to give to the Jury defendant's requested instruction No. 16 as follows:

"You are instructed to return a verdict of not guilty on all the counts in the indictment contained as to the defendant, Frank Kelly."

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Seventeenth. The Court erred in modifying defendant's requested instruction No. 13 by striking therefrom the first five lines. The requested instruction reading as follows:

"You are further instructed that the mere aiding of a person, such as the procuring of a rail-

road ticket or the sending of money to travel with which to purchase a ticket, does not come under the interstate commerce regulations and is not a violation of the so-called White Slave Act, and if you find in this case that the defendants as a part of their contract of employment simply advanced fare to the Hilkert girls in order to enable them to travel from Seattle, Washington, to Anchorage, Alaska, and there to enter upon their contract of employment as entertainers, then your verdict will be not guilty as to both defendants as to each and every count in the indictment; unless, however, you are satisfied beyond all reasonable doubt that at the time said transportation was provided, if it was so provided, by the defendants to the Hilkert girls, the defendant, Frank Kelly, and the defendant Mrs. Grace Kelly, furnished such transportation with the intent then and there to induce and entice the said Mildred Hilkert and Margaret Hilkert to become prostitutes and to give themselves up to debauchery and to engage in other immoral practices."

To the refusal of the Court to give said requested instruction in full the defendant duly excepted in the presence of the jury, and before they retired, which exception was by the Court allowed.

Eighteenth. The Court erred in refusing to give to the jury defendants' requested instruction No. 22, as follows:

"You are instructed, that contracts of employment, and other contracts, may be entered into by and through the means of telegraphic correspondence; that is to say, an offer of employment made by telegraphic or cable communication may be ac-

cepted by such means or mode of communication; that if you find, from a consideration of all the testimony submitted, that the Misses Hilkert came to Alaska in consequence of and in accordance with the telegraphic offer of the defendant, Frank Kelly, and by the acceptance of such offer as embodied in said telegraphic or cable communication bound themselves to repay to the defendant, Frank Kelly, the cost of the transportation on the basis of a weekly deduction from the salary contracted to be paid, then, and in that event, you must find the defendant, Frank Kelly, "Not Guilty," as to all the counts in the indictment contained, for the reason that lending money with which to enable another to travel or to purchase transportation, does not come under interstate commerce regulations and is not a violation of the so-called White Slave Act."

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Nineteenth. The Court erred in refusing to give to the jury defendants' requested instruction No. 23, as follows:

"You are instructed that if the Government adduced testimony as to isolated incidents that tended to show the atmosphere of the place where the girls worked. the same should not be considered by the jury unless the incidents tended to establish the gist of the charges in the indictment, that is, tended to show that the defendants intended on August 3, 1921, to bring the girls to Anchorage for the purposes of prostitution and debauchery; and if the incident related by the Government

witnesses did not so show, the defendants were not required to answer them."

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

The points raised in the assignment of errors may be summarized as follows:

1. INSUFFICIENCY OF EVIDENCE.
2. ERROR IN ADMISSION OF TESTIMONY.
3. ERROR IN REFUSAL OF INSTRUCTIONS.
4. MISCONDUCT OF JUROR.
5. ILLEGALLY CONSTITUTED JURY.

I.

INSUFFICIENCY OF EVIDENCE

(A) It is the claim of the plaintiff in error that there is no evidence that the journey from Seattle to Alaska was undertaken with the intent upon the part of the female witnesses to engage in sexual intercourse or to indulge in other immoral practices.

(B) The uncontradicted testimony shows that the said female witnesses did not engage in sexual intercourse and denied that they engaged in any immoral practices (Record, page 116).

Cross examination of Margaret Hilkert Johnson:

Q. "Did you became a prostitute at Anchorage, Alaska, after August 3rd?

A. I did not.

Did you give yourself up to debauchery at Anchorage or engage in immoral practices?

A. I did not."

(C) That the uncontradicted testimony shows that after the two female witnesses arrived in Alaska pursuant to telegraphic contract as entertainers at a stipulated salary, they continued in such employment for the period from August 21st to September 5th, 1921.

(D) That the testimony would seem to conclusively establish upon a fair consideration of the same that when Kelly telegraphed transportation for the two young women, his only desire or intention was to secure their services as entertainers in his place of business on the main street of Anchorage, Alaska, in a building 140 feet long by 50 feet wide, in which were six pool tables, one billiard table, two bowling alleys and a cigar, tobacco and cigarette counter (Record, page 132).

"Q. Now, describe to the jury and Court that pool-hall so far as the downstairs arrangement is concerned?

A. Downstairs there is six pool-tables and a billiard table.

Q. How long a building is it?

A. 140 feet long by 50 feet wide.

Q. You say there are six pool-tables?

A. Downstairs there are six pool-tables and one billiard table; there are two bowling alleys and there is a counter in the front and lined up with cigars and tobacco and cigarettes, and a back counter also with cigarettes.

Q. What part of the hall did the pool-tables occupy?

A. They occupy the main floor.

Q. Is it on the right side of the main floor or the left side?

A. On the right side as you go in.

Q. And the left side,—what is there?

A. That is the bowling alley.

Q. That occupies about half?

A. No, the pool-tables occupy about two-thirds."

(E) The transaction resulting in the coming to Alaska of the two young ladies going under the name of Margaret and Mildred Hilkert—strangers to Kelly, and Kelly an absolute stranger to them—is shown as follows (Record, pages 133-134):

"Q. Now, in starting in the cabaret business, Mr. Kelly, did you consult any attorney here in the city regarding your rights in the matter?

A. I certainly did.

Q. Did you act upon that advice?

A. Absolutely on his advice.

Q. Was that advice of such a character as led you to believe that you had a perfect right to enter into the cabaret business?

A. Absolutely.

Q. And you entered into this cabaret business on that advice?

A. Yes, sir.

Q. Now, along about the first or second of August, 1921, did you wire out to Seattle for two young ladies to come up here and to act as entertainers?

A. Yes, sir.

Q. What were the names of those two young ladies?

A. Margaret Hilkert—there was some little controversy about her name—Margaret Hilkert and Mildred Hilkert.

Q. How did you know these two girls?

A. A gentleman by the name of Fred Waller—I had spoken about, had figured on a cabaret entertainment for the public, as there was nothing but moving pictures here, and I told him I thought it would be a good idea, as the people had no entertainment but pictures, and he told me of a couple of friends of his in Seattle that were entertainers. I told Fred, 'It is a little too early yet to bring them up here.'

Q. Did he mention their names?

A. I think he did; I wouldn't swear positively.

Q. Were these the two young ladies you wired for?

A. Yes, sir."

Government Exhibit A, page 18:

ANCHORAGE, Alaska, August 1, 1921.

Mildred Hilkert,

Normandie Apts., Seattle, Wash.

Fred Waller just arrived in Anchorage and spoke to me about you and your sister wanting to come to Anchorage. Let me know at once your lowest salary for you and your sister per week to work for me, you play the piano and sing, and sister help you also. Will advance your transportation and you both pay five dollars per week until transportation is paid out. Answer quick. Fall and winter engagement.

RAGTIME KELLY.

Government Exhibit B, Record, page 21:

SEATTLE, Wn., Aug. 2, 1921.

Ragtime Kelly,

Anchorage.

Twenty-five per week for self and twenty for sister. Can leave as soon as transportation arrives. Answer at once.

MILDRED HILQUERT.

Government Exhibit D, Record, page 23:

ANCHORAGE, Alaska, ——, 192—

Mildred Hilkert,

Normandie Apts., Seattle, Wash.

I am wiring two tickets for next Alameda.

RAGTIME KELLY.

The tickets referred to in Government Exhibit D were secured from P. B. Coe, agent of the Alaska Steamship Company at Anchorage, Alaska, and Mr. Coe, by wire, authorized the furnishing of such transportation in Seattle, as per Government Exhibit E, Record, page 24:

NITE LETTER 40 PD.
ANCHORAGE, Alaska, August 3, 1921.

C. F. Henrioud,
Alaska Steamship Co.,
Seattle, Wash.

Notify by telephone and furnish Mildred Hilkut and sister Normandy Apartments upper deck tickets if possible otherwise lower deck Seattle to Anchorage on Alameda sailing from Seattle August ninth Stop Value hundred sixty-nine dollars and fifty-six cents. Debit me.

P. B. COE.

ARGUMENT

The insufficiency of the evidence was challenged by motion for a directed verdict (Record, page 212).

By MR. RAY. "My second motion is as follows: Comes now the defendants, Mrs. Grace Kelly and Frank Kelly, and moves the Court to instruct the jury to return a verdict of 'Not Guilty' as to both defendants upon all the counts in the indictment in this case on the ground that the uncontradicted evidence submitted in this case shows that the witnesses, Misses Hilkert, came to Alaska under a contract of employment with the defendant, Frank Kelly, entered into by means of telegraphic and cable communication, and that as a

consideration of the contract and one element thereof, the witnesses, the Misses Hilkert, were to repay Frank Kelly, the defendant, the cost of transportation advanced by the said Kelly to the said Misses Hilkert, upon the basis of a deduction of $5.00 per week from the contracted salary as set forth in such telegraphic communication and that the advance of such transportation with the contract to repay as shown by the uncontradicted evidence in this case, does not come under the Interstate Commerece Regulations and is not a violation of the so-called White Slave Act."

Plaintiff in error contending for the rule laid down in *Thorn v. U. S.*, 278, Fed 932, quoting on page 934 from *Wright v. U. S.*, 227 Fed. 855, as follows:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the dutv of the trial court to instruct the jury to return a verdict for the accused * * * * "

This principle is also stated in the case of *Sullivan v. U. S.*, 283 Fed. 865, at page 868 and we cite herein the cases there cited:

Union Pacific Coal Company v. United States, 173 Fed. 737, 740, 97 C. C. A. 578; *United States Fidelity Guarantee Co. v. Des Moines National Bank*, 145 Fed. 273, 279, 74 C. C. A. 553; *Vernon v. United States*, 146 Fed. 121, 123, 76 C. C. A. 547; *Sherman v. United States*, (C. C. A.) 268 Fed. 516, 516; *Garst v. United States*, 180 Fed. 339, 343, 103 C. C. A. 469; *United States v. Richards* (D. C.) 149 Fed. 443, 454.

Under the provisions of the Alaska Code, requiring the Court to give reasons and to make a statement and explanation of sentence where a penalty less than that prescribed by statute is imposed (Record, page 265) the trial judge says:

> "In this case the jury recommended the defendant to clemency. It is also the opinion of the trial judge that it is at least doubtful whether the evidence was sufficient to justify a verdict of guilty against the defendant."

Plaintiff in error respectfully submits that an examination of the testimony, which is not long or involved, will show but one conclusion; and that is, there is grave doubt as to the sufficiency of the testimony to justify a verdict against the defendant.

The trial judge, having such doubt in his mind, as shown by the record in this case and herein quoted, should have directed a verdict of Not Guilty.

The expression of the trial judge:

> *"It is also the opinion of the trial judge that it is at least doubtful whether the evidence was sufficient to justify a verdict of guilty against the defendant."*

is tantamount to a statement that all the substantial evidence in the case was as consistent with the innocence of the defendant as with his guilt. Also, that there was substantial evidence of facts which did not

and does not exclude every other hypothesis but that of guilt.

We submit the telegraphic correspondence, in itself, raises a presumption of innocence upon the entire record—for it can hardly be assumed, we contend, as a fair argument, that Kelly would wire to Seattle, Washington, in order to secure two girls for immoral purposes, women who were absolutely strangers to him 1900 miles distant, and who he only desired as a means of drawing people to spend money in his pool, billiard, bowling alley and amusement place, merely desiring the women as a novelty, in Alaska, to attract and draw trade to his licensed place of business. Attention is respectfully called to the utter impossibility of sexual acts in the premises described as operated by Kelly. While it is, of course, true that the attendance of young ladies as clerks in cigar stores. pool and billiard halls, bowling alleys, etc., does not tend to elevate such persons or tend to the refinement of young women, yet such employment in itself is not disgraceful and does not bring into disrepute such young women unless they by their own actions and solicitations pursue such a course of conduct that an imputation may arise therefrom as to immorality.

It is apparent that the young ladies upon arrival in Anchorage, Alaska, could have cancelled their contract and secured passage money for their return to Seattle, had they at that time been dissatisfied with the prospects and surroundings of their employment.

If the "atmosphere" surrounding such employment, towards which the Court permitted the prosecution to direct its testimony, in the case, at the time of the arrival of the young women in Anchorage, or within one or two days thereafter, was not in harmony with the ideas the young woman then had of right and wrong and of morality and immorality, they could have avoided the appearance of evil by departing from the society or place of business of Frank Kelly.

We call attention to the case of *Van Pelt v. U. S.*, 240 Fed. 346, a reported case from the Fourth Circuit. There is no evidence that the defendant had any purpose of debauching the prosecuting witness in any one of the meanings of the word, and we submit that it is absurd to think that Kelly, seeking an attraction for his place of business, would telegraph to absolute strangers, furnish them with transportation in the large sum of money required, in order to secure profit from the prostitution of such women.

We submit there is no evidence from which it can reasonably be held that such anticipation played any part whatever in inducing Kelly to arrange for the women to come to Alaska. No possible reason is suggested by the record why he should have gone to the trouble and expense of securing the two women to make the trip that they did, other than a desire to attract business to his pool-room, bowling alley and amusement place.

We submit there is nothing in the evidence upon which a rational mind might arrive at the same conclusion that the jury did. It is apparently a case where the jurors have altogether missed the issue they were to try, and it appeared to such jurors that there is no question the defendant conducted a place of business not conducive to good morals for which the jury believed Kelly deserved punishment. But the moral conduct of Kelly was not a question for the jury to pass upon.

The jury recommended clemency (Record, page 234).

Such verdict is so inconsistent as to make conclusive the doubt of the jury as to the guilt of Kelly under the charges of the indictment.

It is incredible that a jury would condone, excuse, extenuate and palliate the crime of a panderer

and a procurer by a recommendation of clemency in mitigation thereof.

Men do not, as jurors, excuse defendants in the commission of crimes of such nature. Is this not conclusively true of frontier countries?

The jury had no doubt but that Kelly should receive punishment, and undoubtedly came to the conclusion the moral conduct of Kelly was not to be passed upon with approval.

Again. adapting the language of the opinion of the Court in *Van Pelt v. United States,* 240 Fed. 346, 349, "Sometimes, * * * * jurors do miss altogether "the issue they are to try. They are not altogether "unlikely to do so, if it appears that there is no "question that the defendant has done something, "whether charged in the indictment or not, for which "he richly deserves condign punishment."

We submit the jury entertained some doubt as to Kelly's guilt, hence the recommendation for clemency; otherwise, in the case at bar, no such halting and "stammering" verdict would have been returned. This, together with the doubt expressed by the trial judge as to the sufficiency of the evidence, would seem to warrant a reversal of the case.

In the Athanasaw case, 227 U. S. 326, 57 Law Ed. 529, the law seems to be established that

> "Procuring or aiding the interstate transportation of a girl for the purpose of employing her under such surroundings as tended to induce her to give herself up to a condition of debauchery which virtually and naturally would lead to a course of sexual immorality constitutes the offense denounced by the White Slave Act of June 25, 1910, as the obtaining, aiding or inducing the interstate transportation "of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel, such woman or girl to become a prostitute, or to give herself up to debauchery or to engage in any other immoral practice."

In that case, however, the girl therein named was but seventeen years of age. In the case at bar both women were married (Record, pages 34 and 103), and one of said witnesses, as shown by affidavit accompanying motion for new trial was, at the time of the trial, married to two different men (Record, page 272, 273 and 274), which information did not come to the possession of the defendant until after the trial of the case.

We submit that it is difficult to determine what particular standard shall be followed in defining immoral purposes. The theory of the prosecution being that the employment was such as to tend or cause

the two women to necessarily and naturally lead a life of debauchery of a carnal nature, and relating to sexual intercourse between man and woman. While plaintiff in error contends the employment, as shown by the facts in this case, would not necessarily tend to such debauchery or naturally lead to a course of sexual immorality. It would seem to be a fair argument that it was entirely within the power of the two women, so far as their employment was concerned, whether they remained or became moral or immoral.

From a perusal of the testimony of the Misses Hilkert, and the direct and cross-examination of the two witnesses, we think it is apparent, the young women were fully able to take care of themselves. Both appeared to be of age, in possession of their natural faculties, and beyond the average in intelligence. We submit as to the main witnesses for the Government. their employment was honorable or dishonorable as they themselves decided, and were subjected to no improper advances which their own conduct did not impliedly invite.

II.

ERROR IN ADMISSION OF TESTIMONY

In the discussion of the insufficiency of the evi-

dence, general reference has been made to the facts in the case. In the assignment of errors, attention has been called specifically to alleged error in the admission of testimony tending to show the intent of the defendant Kelly at the date of furnishing the transportation plead in the indictment. We therefore call, generally, the Court's attention to assignment of errors as printed in this brief to the 1st, 2nd, 3rd, 4th, and 7th assignment of errors, all of which assignments cover this particular.

III.

ERROR IN REFUSAL OF INSTRUCTIONS

Many instructions were requested by the defendant of the trial court. On the whole case the instructions of the Court were favorable to the defendant. The failure to instruct the jury to return a verdict of Not Guilty as to the defendant Grace Kelly, wife of Frank Kelly, jointly indicted with him, cannot now, of course, be urged by reason of the verdict of the jury in her behalf, yet submitting to the jury the question of fact relative to the guilt of Mrs. Kelly we submit prejudiced the right of the co-defendant, Frank Kelly, who prosecutes this writ or error. Plaintiff in error requested an instruction (Assignment of Error No. 18, Record, pp. 299-300), which the Court refused.

Eighteenth. The Court erred in refusing to give to the jury defendants' requested instruction No. 22, as follows:

> You are instructed that contracts of employment and other contracts, may be entered into by and through the means of telegraphic correspondence; that is to say, an offer of employment, made by telegraphic or cable communication, may be accepted by such means or mode of communication; and if you find, from a consideration of all the testimony submitted, that the Misses Hilkert came to Alaska in consequence of and in accordance with the telegraphic offer of the defendant Frank Kelly, and by the acceptance of such offer as embodied in said telegraphic or cable communication bound themselves to repay to the defendant Frank Kelly the cost of the transportation on the basis of a weekly deduction from the salary contracted to be paid them, and in that event you must find the defendant Frank Kelly, 'Not Guilty', as to all the counts in the indictment contained, for the reason that lending money with which to enable another to travel or to purchase transportation, does not come under Interstate Commerce regulations and is not a violation of the so-called White Slave Act."

We submit that such instruction upon the evidence was a right the defendant had, and the failure to give such instruction was prejudicial error.

Plaintiff in error requested the instruction set forth in the Assignment of Error No. 19 (Record, pp. 300-301) which the Court refused:

"Nineteenth. The Court erred in refusing to give to the jury defendants' requested instructions No. 23, as follows:

> You are requested that if the Government adduced testimony as to isolated incidents that tended to show the atmosphere of the place where the girls worked, the same should not be considered by the jury unless the incidents tended to establish the gist of the charges in the indictment, that is, tended to show that the defendants intended on August 3, 1921, to bring the girls to Anchorage for purposes of prostitution and debauchery; and if the incidents related by the Government witnesses did not so show, the defendants were not required to answer them."

The admission of testimony covering a considerable period of time attempting to prove isolated incidents as tending to show the atmosphere of the place where the girls worked as proof of intent, made it impossible for the defendants to answer such incidents by the testimony of witnesses who were undoubtedly present at the time of the occurrences testified to. The defense had no knowledge that they would be compelled to defend upon a charge of misconduct in the conduct of their place of business, and the defendant Kelly, it would seem, should have been given the benefit of such instruction upon the basis that it was not necessary for Kelly to prove his innocence. Had the jury followed the instructions of the Court upon the evidence, we fail to see how any ver-

dict other than Not Guilty could have been properly returned.

IV.

MISCONDUCT OF JUROR

It appears that the juror, D. H. Williams, foreman of the trial jury, was permitted to separate, during the deliberations of such jury, from the remaining eleven members of the said jury. This is shown by the affidavit of John F. Coffey, one of the counsel for defendant at the trial of the case (Record, pp. 248-249). The two bailiffs in charge of the jury and the juror himself deny any misconduct upon the part of such juror, and such juror goes so far as to state in his affidavit (Record, page 259) that "Affiant "therefore states that, to his knowledge, no harm or "prejudice was done to the defendants or either of "them on account of said transaction." In this respect the Alaska Code, Section 1024, Compiled Laws of the Territory of Alaska, 1913, provides in part as follows (Record, pp. 238-239):

> "After hearing the charge the jury may either decide in the jury-box or retire for deliberation. If they retire they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his abil-

> ity, keep the jury thus together separate from other persons, without drink, except water and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on."

We think the juror's action being contrary to the mandatory and express provision of the law, creates a presumption that the defendant was prejudiced thereby; this upon the theory that we are not able to ascertain whether or not such juror communicated with any person, nor with the bailiff; and, from the standpoint of the defendant, we think we are entitled to presume that communications were had by and between such juror and the bailiff who accompanied him. In this respect we cite the case of *State v. Thorn,* 117 Pac. Rep., page 58, a Utah case decided May 29th, 1911, a homicide case, and in which case one of the trial jurors, with one of the bailiffs, went into another part of the building, while the jury was at luncheon in a hotel in charge of two officers, and talked to someone over the telephone. We quote from the opinion in said case, pages 66-67, as follows:

> (8) It is further contended that a new trial ought to have been granted on the ground of the separation of the jury and the misconduct of one

of its members. The defendant, in support of his motion, showed that after the case was finally submitted to the jury, and before they had concluded their deliberations, and while they, in charge of two officers were at lunch in a public hotel, seated at the lunch table, one of the jurors with one of the officers went into another part of the building where the juror talked to some one over the telephone. These facts were not disputed. The state offered no evidence to dispute them, nor did it attempt to show what the conversation over the telephone was, or with whom it was held, or that it was harmless, and could not have influenced or affected the deliberations of the juror or his verdict. The state, in effect, urges that injury or prejudice may not be presumed from the unexplained communication, and to sustain his claim of prejudice the defendant was required to show that some harmful information was communicated to the juror which tended to influence or affect his deliberations and verdict, or circumstances from which it could be inferred, and until such proof was made the state was not required to show the contrary. That rule might well be applied to communications between a juror and a person having no interest in the litigation, which were authorized and not forbidden. It may be presumed that a juror, who, pending the trial, or after the retirement of the jury to consider of their verdict, and not forbidden to do so, communicates with one, a stranger to, and not interested in, the litigation, communicated about something not related to the case or the parties. An unexplained communication under such circumstances would not amount to misconduct, unless the circumstances attending it were such as to induce an inference of some wrongful or improper conduct. In such case a presumption of prejudice should not be indulged from an unexplained communication even though from the attending

circumstance it may be said that the conduct with respect to it was of doubtful propriety. But here the communication had, under the circumstances disclosed, was unauthorized and forbidden. If it was necessary for the juror to communicate with some one over the telephone or otherwise, the matter should have been called to the attention of the court who could have granted or refused the permission as the exigencies of the case required. To hold such private communication, under the circumstances, apart from and in the absence of his fellow jurors, and without the court's permission, certainly was misconduct. Such conduct cannot be tolerated and the purity of the jury maintained. To permit it and to excuse it as to one juror requires a permission of it to others. To do that is to allow members of the jury to be brought in contact with outsiders, and to afford them an opportunity to hold prejudicial communications about the case, or at least to expose them to such harmful and prejudicial influences. The juror here by his misconduct exposed himself to such influences. What the juror said over the telephone, or what was said to him, is not made to appear. Had his conduct in such particular not been misconduct, perhaps the presumption might be indulged that what was said by him or communicated to him was entirely personal to him and unrelated to the case until the contrary was made to appear. But he did something which he was unauthorized and forbidden to do. He was a contemnor and a wrongdoer. From the misconduct disclosed and the exposure of the juror to harmful influences, prejudice is presumed, and the burden cast on the state to show what the communication was, and that it was harmless and could not have influenced or affected the deliberations of the juror or his verdict. *Saltzman v. Sunset Tel., etc. Co.*, 125 Cal. 501, 58 Pac. 169; *State v. Cotts*, 49 W. Va., 615, 39 S. E.

605, 55 L. R. A. 176; *Hempton v. State,* 111 Wis. 127, 86 N. W. 596; *Gandy v. State,* 24 Neb. 716, 40 N. W. 302; *Tarkington v. State,* 72 Miss. 731, 17 South, 768; *Robinson v. Doneho,* 97 Ga. 702, 25 S. E. 491.

And generally in cases where it was held that the misconduct of a juror engaging in unauthorized communications with others was not prejudicial, and did not vitiate the verdict, it was affirmatively and clearly made to appear what the conversation or communication was, and that it was entirely harmless and unrelated to the case, or, in case of a separation, that the circumstances were such that the juror was not, and could not have been exposed to prejudicial or harmful influences by reason of the separation. The court in the case of *Hempton v. State, supra,* while stating that "the courts have gone a great way in sustaining verdicts, even in capital cases, notwithstanding misconduct upon a satisfactory affirmative showing that their impartiality and the result of their labors were not affected thereby," also observed that "there seems to be a growing tendency in the management of juries in important cases which calls loudly for a check if not for a substantial reform, if judicial administration is to be kept above suspicion as regards weighing out justice with the highest attainable degree of certainty." To obtain the free and dispassionate judgment of jurors in the trial of capital cases, long experience has demonstrated the necessity of preventing the jury from mingling or conversing with the people, and of keeping them secluded from all outside influences calculated to interfere with or affect their im partiality or judgment. These safeguards were at common law deemed essential to the right itself of trial by jury. That right with its ancient safeguards has been preserved in this country by Con-

stitutions and statutes. An infraction of it calculated to impair the right cannot properly receive the sanction of the court without doing violence to such constitutional and statutory provisions. If it should be thought that they no longer serve a useful purpose, let them be abolished and taken out of the Constitution and statute and others substituted in their place. As long as they remain, it is the duty of the courts to see that they are observed and obeyed. After a final submission of a case to a jury, and before reaching a conclusion as to their verdict, to permit a juror without the court's permission to leave his fellow jurors and go to another portion of the building and there engage in a private conversation over the telephone is a practice not to be tolerated, if these constitutional and statutory provisions are to be observed and given effect. He might as well be permitted to leave them, and to go on the street, or to his office, and there engage with some one in conversation. To say that the accused cannot sustain his claim of prejudice until he also shows that the juror talked about something harmful to the accused's rights is to fritter away the constitutional and statutory provisions requiring the jury to be kept secluded from all outside influences. It is enough that the state, to sustain the verdict against the accused under such circumstances, is permitted to show that the conduct, though wrongful and in disobedience of the statute and the directions of the court, nevertheless was harmless, by showing all that was said and done, and by clearly and affirmatively showing that the accused was not, nor could have been, prejudiced thereby. The state not having done this, is not entitled to hold a verdict."

This becomes doubly important by reason of the fact that this same juror, of whose misconduct we

complain, as contended by plaintiff in error, is the specific element which makes the trial jury an illegally constituted jury in that such juror had been formerly convicted of a felony and had qualified in the case as a juror, as we contend, wrongfully. We cover this matter under the next heading.

V.

ILLEGALLY CONSTITUTED JURY

Kelly moved to vacate the judgment rendered against him as void (Record, page 265), and in support thereof filed the affidavit of Charles A. Coates (Record, pages 267-268); Mrs. Grace Kelly (Record, pages 268-273), J. C. Murphy (Record, pages 275-276), and of the Rev. A. J. Markham (Record, pages 276-277). These affidavits stand uncontradicted upon the record with the exception of the affidavit of the Rev. A. J. Markham, which is to some extent controverted by the affidavit filed on behalf of the Government of the Rev. W. S. Marple (Record, page 278).

The authority for this procedure is claimed by plaintiff in error to be covered by the decision in the case of the *United States v. Port Washington Brewing Co., et al.,* 277 Fed. 306, in which the first syllabus is as follows:

"The writ of error *coram nobis* has been abolished in federal procedure as a specific remedy, and motions in the case substituted."

It is doubtless unnecessary to cite authorities relative to the power of the trial court to vacate and set aside its judgment, and we cite in support of this claim, *Mossew v. United States,* 266 Fed. 18, reversing 261 Fed. 999; *Freeman v. U. S.,* 227 Fed., 732; U. *S. v. Howe,* 280 Fed. 815.

An examination of the affidavits filed in support of this motion shows that the juror, D. H. Williams, was identified by the affiant Coates as a man who formerly had served a term in the Oregon State Penitentiary at Salem, Oregon; the affidavit of Mrs. Grace Kelly shows that D. H. Williams qualified as a juror and in response to questions propounded to him by counsel stated that he had not been convicted of a felony, that he had no information or knowledge of any facts relative to the offense or offenses charged against the defendant Kelly, had expressed no opinion, and was without prejudice to either of the defendants. That since the trial of the cause and the entry of judgment it was ascertained that Williams was convicted of a felony, sentenced to a period of from one to five years in the Oregon State Peniten-

tiary. See copy of the prison register of said penitentiary (Record, pages 269-270).

The affidavit of J. C. Murphy shows the prior conviction of the juror Williams was not learned until after the verdict had been reached, and that the said Williams had on many prior occasions acted as a juror in the Commissioner's Court, but there was no knowledge of the fact of Williams' former conviction (Record. pages 275-276).

In the affidavit of Mrs. Kelly (Record, page 271), she states the juror Williams was present at a meeting the latter part of August, in the year 1921; names certain persons present; and that as a result of such meeting Williams was deputized and authorized to take action against the defendant, Frank Kelly, with reference to the place of business conducted by him. This affidavit is to a large extent corroborated by the affidavit of the Rev. A. J. Markham (Record, page 276), while, however, the Rev. W. S. Marple, in his affidavit (Record, page 278) states that D. H. Williams was not present at the meeting described but admitted the other gentlemen named in the affidavit of the Rev. Markham were present.

Section 2120, Compiled Laws of Alaska, 1913, provide as follows:

> Sec. 2120. That a person is not competent to act as a juror who has been convicted of a felony nor unless he be a citizen of the United States, a male inhabitant of the District, over twenty-one years of age and in possession of his natural faculties and of sound mind.

The provisions of the section quoted would seem to be mandatory and it is our contention that the including of a felon as a member of the trial jury in the case at bar makes the verdict of such jury void in that defendant was not tried by a legally constituted jury.

The case of *Queenan v. Territory,* 71 Pac. 218, 61, L. R. A. 374, would seem to hold adversely to contention of plaintiff in error in this regard, but an examination of the opinion of Mr. Justice Holmes in the affirmance of the same case on other points, 190 U. S. 458, 47 Law Ed. 1175, cited in the Supreme Court Reports as *Thomas B. Queenan v. Territory of Oklahoma,* we think aids our contention. We quote as follows:

> "3. In the course of the trial the Government announced that since the last adjournment it had been informed that one of the jurors, named, had been convicted in Nebraska of what, by the law of that state, was a felony,—grand larceny,—

at a time and place mentioned, contrary to the statement of the juror on the *voir dire*. We assume, for the purposes of decision, that this disqualified the juror from serving in any case. Okla. Stat. Secs. 3093, 5182, 5183. The court asked the counsel for the prisoner what they desired to do, and its intimation indicated that if the objection were pressed the juror would be excused. This, of course, meant that the trial would have to be begun over again. The counsel for the prisoner answered that they had nothing to say, and the trial went on. It is now argued that the defendant was deprived of a constitutional right, which he could not waive. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. The contrary plainly is the law as well for the territories as for the state. See *Kohl v. Lehlback*, 160 U.. S. 293, 299, 40 L. ed. 432, 434, 16 Sup. Ct. Rep. 304, et seq., *Raub v. Carpenter*, 187 U. S. 159, 164 ante, 119, 121, 23 Sup. Ct. Rep. 72.

It is argued that the court could not have permitted a challenge at that time, because the statutes of Oklahoma, Sec. 5177, provided that "the court, for good cause shown, may permit a juror to be challenged after he is sworn to try the cause, but not after the testimony has been partially heard." This statute cannot be construed as going merely to the order of procedure,—as depriving a party of the right to challenge pending the trial, but as preserving the right for the purpose of a motion for a new trial. Either it does not apply to the case of a disqualification discovered as this was, after a part of the evidence was in, or it purports to take away the right altogether. Whatever may be the true construction of the last clause, the court seems to have been ready to stop the trial. But if the court's view was wrong, if the statute is constitutional,—as to which we do not

mean to express a doubt,—the prisoner had no right to complain; and if it is not, it was his duty to object at the time, if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights."

The section of the Alaska Code with reference to the qualification of legal jurors was enacted by Congress, is not state legislation but is legislation by the Congress of the United States declaratory in Alaska of what constitutes an impartial jury under the provision of the sixth amendment to the Constitution. It goes without question that the provisions of the Federal Constitution with respect to the right of trial by jury apply to the Territory of Alaska. *Rasmussen v. U. S.*, 197, U. S. 516, 25 Sup. Ct. Rep. 514, 49 L. ed. 862.

Such constitutional right could not be waived by the defendant or his counsel in a felony case. We submit the statute is mandatory and declaratory of the sixth amendment to the Constitution and is not a statement of a statutory right of challenge.

Section 2233 of the Compiled Laws of Alaska, 1913, makes as a general cause of challenge, first, a conviction for felony," but that particular section is under Chapter XIV, entitled "Of the formation of Trial Jury," and is in respect to procedure, while

Section 2120, of the Code, which we have cited, we claim is not a matter of statutory challenge but the right of the defendant to have a trial by a jury of persons possessing the qualifications stated in said section, viz: a citizen of the United States; a male inhabitant of the district; over 21 years of age; in possession of his natural faculties and of sound mind. And it is reiterated in Section 2228 that trial jurors shall possess the qualifications as stated in Section No. 2120, viz:

> Sec. 2228. That jurors for the trial of persons accused of any of the crimes defined in the laws of the United States, applicable to the District of Alaska, as hereby revised and codified, and for the trial of issues of fact in civil actions, shall be selected and summoned in the manner prescribed by the laws of the United States with respect to jurors of the United States district and circuit courts, and shall have the same qualifications and be entitled to the same exemptions as are provided in Chapter four, Title XV of this act in the case of grand juries.

It could hardly be successfully contended that an insane person, being one of a jury of twelve men, would make a legally constituted jury. For illustration: If a person of unsound mind acted as foreman of the jury in the case at bar, actively participated in the deliberations of such jury; and, after the judgment and sentence was pronounced, such juror was

found to be insane and to have been insane at the time of the trial—would a trial by such a jury having either one or two men of unsound mind be a protection to a defendant under the sixth amendment to the Constitution; and can it be said that the provisions of the amendment are complied with where either one or two members of the trial jury were formerly convicted of felonies?

The Government contends by reason of a decision of the Supreme Court of Oregon, the fact a felon served upon a trial jury is not a deprivation of the constitutional rights of the defendant; but this Honorable Court's attention is expressly called to the fact that the prosecution in this case is under a Federal statute and the question to be here determined cannot be determined by reference to the constitutional provisions of the various states, for the same have no application to trials in the Federal courts for offenses committed against the United States. For a general discussion of the right to trial by jury we cite the case of *Freeman v. U. S.*, 227 Fed. 732, pages 741, at the bottom of the page commencing: "The "most important question presented—in fact, the "only remaining question we find it necessary to "pass upon—is whether the defendant has been con- "victed of the crime for which he was tried in the

"manner the law of the land sanctions * * * * * * *"

It is held in the case of the *State of North Carolina v. Rogers,* 78 S. E. 293, 46 L. R. A. N. S. 38, a defendant who has plead Not Guilty to an accusation of murder, is entitled to be tried by a jury of twelve men which he could not waive even by consenting to proceeding with eleven men in the jury box when one is found mentally unfit.

After the jury was impanelled, before any evidence had been offered, it was stated to the court that one of the jurors selected was subject to fits; that he had been recently in Johns Hopkins hospital; had a part of his brain removed, and was liable to lose his mental balance if subjected to much mental strain. The state offered to call in another juror, or to make a mistrial, or to get an entirely new panel. Counsel for the defendant insisted on proceeding with eleven men. Thereupon upon agreement of counsel in open court made the trial proceeded.

The Supreme Court of the State of North Carolina held that the defendant in such case had not been tried by a jury such as contemplated by the law of the land and ordered a new trial in the case.

In the Queenan case (juror convicted of a felony) defendant had knowledge during the progress of the trial in the disqualification of one of the jurors and

counsel for defendant was given an opportunity by the trial court to take such steps as might be proper to meet the situation.

In the Rogers case (insane juror), counsel for defendant opposed the entry of an order of mistrial, the impanelling of a new jury and proceeded to trial with eleven jurors, eliminating from the jury the particular juror whose mental condition appeared unsound.

In the case at bar no knowledge of the disqualification of the juror Williams was obtained until after trial.. No opportunity afforded at the time of trial to call attention to the disqualification of such juror.

CONCLUSION

For the reasons stated herein we respectfully urge this Honorable Court to enter its order reversing the judgment and sentence heretofore imposed in this case.

Respectfully submitted,

L. V. RAY,

Attorney for Plaintiff in Error.